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An Offensive Mark on Offensive Lines: The Question of Violating the First Amendment Through the Cancellation of the Washington Redskins' Trademark

by GABRIELA M. KIRKLAND*

Introduction

During the course of the 2010 National League Division Series, the Atlanta Braves, a Major League Baseball team, played against the San Francisco Giants.¹ During the post-season series, Giants fans quickly became familiar with the “tomahawk chop.”² Adopted in the early 1990s, the “tomahawk chop” consists of Braves fans “hold[ing] foam tomahawks³ when doing a chopping motion, and . . . sing[ing] a wordless ‘war chant’ in tandem with the chop during athletic events.”⁴

The discussion surrounding team names and mascots derived from Native Americans, alone, is quickly growing into a contentious debate. These depictions of Native Americans and their customs and its people pose an offensive threat to their culture—a culture that seeks to uphold and honor its tumultuous heritage.

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1. 2010 MLB Postseason Schedule, MLB, <http://mlb.mlb.com/mlb/schedule/ps.jsp?y=10> (last visited Mar. 9, 2016).

2. L.V. Anderson, *When Did People Start Doing the Tomahawk Chop?*, SLATE (Sept. 26, 2012, 6:12 PM), http://www.slate.com/articles/news_and_politics/explainer/2012/09/origins_of_the_tomahawk_chop_scott_brown_s_staffers_mocking_elizabeth_warren_are_continuing_a_long_tradition_.html.

3. Tomahawks were not only used as weapons by Native Americans but also revered as sacred objects. *Id.*

4. *Id.*

At the forefront of this ongoing dilemma as to whether to change an arguably—yet subjectively opined—offensive team name depicting Native Americans is the Washington Redskins⁵ (“Redskins”) team name. The Washington Redskins team name, adopted in 1933, is currently viewed as “derogatory, disparaging, and offensive” to the Native American culture and heritage due to its image of a Native American chief as the primary logo that is featured on the team’s helmets.⁶

As a result, people of the Native American culture are vehemently voicing their concern regarding this name. Seven Native Americans took action and filed a trademark cancellation request in, what came to be known as, *Harjo v. Pro-Football, Inc.* to the Trademark Trial and Appeal Board (“TTAB”).⁷ The respondent in that case (Pro-Football, Inc.) argued that petitioners’ arguments “abridge[d] [its] right to freedom of speech provided by the First Amendment to the United States Constitution”⁸ and that “respondent’s registered marks are a form of speech protected by the First Amendment to the United States Constitution and thus cannot be regulated or cancelled merely because these petitioners may find them objectionable.”⁹ However, the TTAB determined that it lacked the authority to make a constitutional determination of the Lanham Act provisions.¹⁰ Therefore, the First Amendment argument was not addressed at that time in litigation.

Given the arguments in *Harjo* and the ultimate ruling that the TTAB lacked the authority to make a constitutionality determination,¹¹ the question of whether the government could actually regulate the registration of disparaging marks became a topic of concern for similar and related cases. In its 2015 holding of *In re Tam*,¹² the Federal Circuit held that, despite “personal feelings about the mark at issue [t]here, or other disparaging marks, the First Amendment *forbids* government regulators to

5. I will, hereafter, refer to the Washington Redskins as the “Washington Redskins” and “Redskins” interchangeably.

6. Julie A. Hopkins & Thomas M. Joraanstad, Article, *Challenge-Flag Thrown: The Trademark Trial and Appeal Board’s Cancellation of the Redskins’ Trademarks and Pro-Football’s Chances on Appeal*, 10 J. BUS. & TECH. L. 271 (2015); Sports Logo History, *Washington Redskins Primary Logo*, <http://sportslogohistory.com/washington-redskins-primary-logo/> (last visited Mar. 22, 2017).

7. *Harjo v. Pro-Football, Inc.*, 30 U.S.P.Q.2d (BNA) 1828, 1829 (T.T.A.B. 1994).

8. *Id.* at 1830.

9. *Id.*

10. *Id.* at 1833.

11. *See id.*

12. *In re Tam*, 808 F.3d 1321 (Fed. Cir. 2015).

deny registration because they find the speech likely to offend others.”¹³ This decision was momentous to Pro-Football’s argument in its own ongoing litigation regarding the Washington Redskins team name.¹⁴ While the holding in *In re Tam* is not binding on the Fourth Circuit (the court, which is now considering the cancellation of the Redskins’ trademark registration), it sets up a new and surprising precedent that inquires whether a disparaging mark exclusion is a viewpoint-based denial of protection for private speakers’ speech, which would be in violation of the First Amendment.¹⁵

This Note comes at an exciting point in the Washington Redskins’ litigation process. In early October 2016, the Supreme Court announced that it will not grant the Washington Redskins’ appeal concerning the constitutionality of revoking its trademark designated by the United States Patent and Trademark Office (“USPTO”).¹⁶ However, the Washington Redskins have another parallel case in *Lee v. Tam*,¹⁷ that the team can use to bolster their argument and possibly win their case through a lower court in the future. This is because, in both cases, the respective plaintiffs argue that it is unconstitutional for the government to reject trademark rights for offensive speech.

As of this Note, the Supreme Court Justices have heard oral arguments in *Lee v. Tam*, on whether the name of a rock band (The Slants) is considered offensive.¹⁸ The Washington Redskins could use the Supreme Court’s future judgment, if favorable, to strengthen and backup their case in future litigation through the Fourth Circuit.

In Part I, this Note will provide the history of offensive trademarks in American sports. This history will include a brief look at the usage of other Native American terms in team sports names, from the Boston Braves to the Florida State University Seminoles. This part will also provide a history of the Washington Redskins’ name. Although the

13. *Id.* at 1358 (emphasis added).

14. *Harjo v. Pro-Football, Inc.*, 30 U.S.P.Q.2d (BNA) 1828, 1829 (T.T.A.B. 1994).

15. Eugene Volokh, *Federal Appeals Court Decides ‘The Slants’ Case: Excluding ‘Disparaging Marks’ from Trademark Registration Violates the First Amendment*, WASH. POST (Dec. 22, 2015), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/12/22/federal-appeals-court-decides-the-slants-case-excluding-disparaging-marks-from-trademark-registration-violates-the-first-amendment/>.

16. Jason Diamond, *Supreme Court Won’t Hear Washington Redskins Trademark Appeal*, ROLLING STONE (Oct. 3, 2016), <http://www.rollingstone.com/sports/washington-redskins-trademark-appeal-denied-by-supreme-court-w443144>.

17. *Lee v. Tam*, 137 S. Ct. 30 (2016).

18. *Trump’s Supreme Court Nominee Set to Bring Conservative Vote Back to SCOTUS Cases*, RT.COM (Feb. 1, 2017), <https://www.rt.com/usa/375854-trump-scotus-nominee-cases/>.

reasoning behind the choice of name remains unclear,¹⁹ the history behind the team's creation is nonetheless interesting. Part II will analyze the precedential cases that have led the Washington Redskins to where they are today in the litigation process. This part will address three main cases: *Pro-Football, Inc. v. Harjo*,²⁰ *Blackhorse v. Pro-Football, Inc.*²¹ and its more recent appeal in *Pro-Football, Inc. v. Blackhorse*.²² The *Blackhorse* litigation and appellate process will be discussed together. Part III will address the legal questions that were decided in those cases and how these will shape possible decisions in the future. This part will explain federal trademark law—more specifically Section 2(a) of the Lanham Act—and address the question that was presented in the appellate case *Pro-Football, Inc. v. Blackhorse*.²³ Whether Section 2(a) of the Lanham Act violates the First Amendment and is, thus, unconstitutional. Part IV will present the case *In re Tam*,²⁴ which was recently decided by the Federal Circuit that changed past precedent on offensive trademarks and now presents an alternative opinion in this ongoing debate as to whether Section 2(a) violates the First Amendment. Holding that Section 2(a) is unconstitutional, *In re Tam* is persuasive in its reasoning and may influence the Fourth Circuit, as the Washington Redskins await their appeal. Finally, Part V will address the newest updates to the Redskins litigation since the Supreme Court granted certiorari to *Lee v. Tam* and will provide an analysis regarding the recent oral arguments for the case.

While other notes have addressed similar topics regarding the Washington Redskins, this Note will examine the possible implications of the *In re Tam* decision on future trademark litigation and discuss how the Supreme Court may alter how it and lower courts will answer this question of constitutionality. This Note will provide reasoning as to why Section 2(a) of the Lanham Act is unconstitutional and that the Fourth Circuit—and perhaps the Supreme Court—should follow the Federal Circuit's decision in *In re Tam*. The case of the Washington Redskins has captivated many, and not only those who are directly affected by the name: the fans and people of the Native American heritage.

Because of *In re Tam*, the pending appeal before the Supreme Court has been given a new breath and new opinion on the law. On April 25, 2016, the Washington Redskins filed a Petition for a Writ of Certiorari

19. See *infra* Part I(B).

20. *Pro-Football, Inc. v. Harjo*, 415 F.3d 44 (D.C. Cir. 2005).

21. *Blackhorse v. Pro-Football, Inc.*, 111 U.S.P.Q.2d (BNA) 1080 (T.T.A.B. 2014).

22. *Pro-Football, Inc. v. Blackhorse*, 112 F. Supp. 3d 439 (E.D. Va. 2015).

23. *Id.*

24. *In re Tam*, 808 F.3d 1321 (Fed. Cir. 2015).

Before Judgment to the United States Court of Appeals for the Fourth Circuit. The Supreme Court has indicated that it plans to rule on whether the USPTO has the right to revoke trademark registrations without violating the First Amendment in *In re Tam* before the Fourth Circuit decides on the issue.²⁵ In this filing, the Washington Redskins presented the following questions to the Court: (1) whether Section 2(a)'s disparagement clause violates the First Amendment; (2) whether Section 2(a)'s disparagement clause is impermissibly vague, in violation of the First Amendment; and (3) whether the government's decades-long delay between registering a trademark and cancelling the registration under Section 2(a)'s disparagement clause violates due process.²⁶ Although the Supreme Court denied certiorari to the Washington Redskins' case, the case will proceed as planned to the Fourth Circuit.²⁷ While it is unclear whether the Fourth Circuit will delay their decision to wait for the *Lee v. Tam* decision, it is interesting to note that the Supreme Court has not delayed the *Tam* litigation, and presumably wishes resolve the issue.²⁸

This Note's conclusion will provide a proposed argument along with a possible resolution to the continuing litigation. In the past, courts—including the Supreme Court—try to avoid cases concerning First Amendment trademark issues. However, given the current denial of certiorari for the Redskins' case and the granting of certiorari for *In re Tam*, it appears that the Court had finally decided the time has come where it cannot avoid these constitutional questions any longer. It is now necessary for the Supreme Court to decide and set the precedent for the lower courts. However, given the recent events surrounding the *Tam* litigation, this Note will argue that adjudication of such an argument is necessary.

25. Ian Shapira, *Redskins Urge Supreme Court to Protect Team's Free Speech Rights*, WASH. POST (July 16, 2016), https://www.washingtonpost.com/local/redskins-urge-supreme-court-to-protect-teams-free-speech-rights-alongside-slants/2016/07/15/53e6c682-4ab3-11e6-acbc-4d4870a079da_story.html?utm_term=.99ec62495044; *Pro-Football, Inc. v. Blackhorse*, 111 U.S.P.Q.2d (BNA) 1080 (T.T.A.B. 2014), *petition for cert. filed*, U.S.P.Q.2d 1080 (2016) (No. 15-1874), <http://www.scotusblog.com/wp-content/uploads/2016/04/Redskins-petition-5-25-16.pdf>.

26. *Pro-Football, Inc. v. Blackhorse*, 111 U.S.P.Q.2d (BNA) 1080 (T.T.A.B. 2014), *petition for cert. filed*, U.S.P.Q.2d 1080 (2016) (No. 15-1874), <http://www.scotusblog.com/wp-content/uploads/2016/04/Redskins-petition-5-25-16.pdf>.

27. *Prof. Christine Farley's Statement the Supreme Court's Denial of Cert. in the REDSKINS Case*, AM. U. WASH. C. L. (Oct. 4, 2016), <http://www.pijip.org/2016/10/04/team-cert-petition-denied/>.

28. The *Tam* litigation has only lasted three years, as opposed to the Washington Redskins' twenty-four years in court. *Id.*

I. History of Offensive Marks in American Sports

A. The Usage of Other Native American Terms in Team Sports

While progress has been made over the last fifty years in support to end “the era of racist and harmful ‘Indian’ mascots in sports and popular culture,”²⁹ it is obvious that these names are still being used and are readily recognizable not only in the sports community but also within the general public. The longstanding history of these teams’ names makes it difficult for the teams to suddenly *change* their names, given their respective fans and traditions. Some of these team names harken back to the very beginning of the 20th century. For example, in 1912, the Boston “Beaneaters” [sic]—now Atlanta Braves—changed its name to the Boston Braves, becoming one of the first professional sports teams to use a Native American term as its team name.³⁰ Since that change in 1912, the usage of Native American terms for team names has increased exponentially with over 3,000 teams (ranging from high school to professional sports teams) using these cultural names.³¹

Despite the prevalence and popularity among teams to adopt these Native American terms, the National Congress of American Indians (“NCAI”) reported that the adoption of new mascots that use racial stereotypes in their names and imagery ceased in 1963.³² In 2005, the National Collegiate Athletic Association (“NCAA”) established an “extensive policy” to remove “Indian” mascots from college sports teams, causing high schools to enact the same removal of such mascots and names.³³ However, it is important to note that although the NCAA sought to do away with the stereotyping of the Native American culture, it granted a waiver to the Florida State University Seminoles, whose mascot name dates back to 1947 and which the university boasts was originally

29. *Ending the Era of Harmful “Indian” Mascots*, NATIONAL CONGRESS OF AMERICAN INDIANS, <http://www.ncai.org/proudtobe> (last visited Apr. 2, 2016); see also *San Francisco Chronicle Bans ‘Redskins’ From Print*, USA TODAY (Oct. 30, 2015, 10:46 PM), <http://www.usatoday.com/story/sports/nfl/redskins/2013/10/30/sf-chronicle-to-stop-using-redskins-in-print/3320657/> (“The San Francisco Chronicle has joined a growing list of publications that will no longer use the term ‘Redskins’ when referring to Washington’s NFL team.”).

30. Hopkins & Joraanstad, *supra* note 6, at 269.

31. *Id.* at 270.

32. *Ending the Legacy of Racism in Sports & the Era of Harmful “Indian” Sports Mascots*, NATIONAL CONGRESS OF AMERICAN INDIANS (Oct. 2013), http://www.ncai.org/resources/ncai-publications/Ending_the_Legacy_of_Racism.pdf.

33. *Id.*

“conceived with input from the Seminole Tribe of Florida.”³⁴ The NCAA granted a waiver to Florida State University because of that consultation.³⁵ In this partnership, the Seminole Tribe even worked with the college to create a regalia that represents the heritage Florida State portrays in donning a team uniform with the term “Seminoles.”³⁶ Thus, because of the tribe’s involvement in the team name, there appeared to be implicit approval of *this* particular usage of a Native American name for a team.

Although the NCAA allowed this exception to Florida State University, the National Football League (“NFL”) has not extended a similar waiver to the Washington Redskins.³⁷ Applying this exception to the Florida State Seminoles—a college NCAA team—implies that professional sports teams are to be held to a higher standard to uphold the integrity of heritages and not promote offensive names.

If this standard is true and a proper interpretation of such an exception, a question remains: Why hold professional sports teams to a higher standard and provide an exception to a college sports team? While the college team may not be on the same caliber or reach the same demographic (fan-base wise) in society, the seemingly offensive name is, arguably, promoted to a younger generation of people. It sends the message to students attending the institution, that he or she must condone or support the term to support the college team. Accepting the offensive name of their school’s team may cause them to take these beliefs with them when they graduate. If a term is to be considered offensive on one scale, it must be considered offensive on another. Otherwise, there will always been a contradiction between the different sports team organizations (NCAA, NFL, and Major League Baseball) as to what term should be allowed or not allowed. To avoid such inconsistencies, uniformity among the different organizations should be required on a moral level.

B. History of the Washington Redskins Name

The Redskins team was originally founded in New England by George Preston Marshall (“Marshall”).³⁸ Marshall’s interest in athletics

34. *Id.*; Chuck Culpepper, *Florida State’s Unusual Bond with Seminole Tribe Puts Mascot Debate in a Different Light*, WASH. POST (Dec. 29, 2014), https://www.washingtonpost.com/sports/colleges/florida-states-unusual-bond-with-seminole-tribe-puts-mascot-debate-in-a-different-light/2014/12/29/5386841a-8eca-11e4-ba53-a477d66580ed_story.html.

35. *Id.*

36. *Id.*

37. Culpepper, *supra* note 34 (“The same NCAA that aimed to scrub away the stereotyping granted a waiver to Florida State in 2005. It cited unique circumstances.”).

38. THOMAS G. SMITH, *SHOWDOWN: JFK AND THE INTEGRATION OF THE WASHINGTON REDSKINS I* (2012).

grew throughout his youth and continued as he climbed the social ladder in both New York and Washington, D.C. Eventually, Marshall approached the NFL about potentially investing in a professional football franchise.³⁹ After being awarded an NFL franchise in Boston, Marshall was determined to succeed.⁴⁰ “For Marshall, a football game meant more than athletic competition; it also meant pageantry, drama, and thrilling family entertainment.”⁴¹ Therefore, football went beyond the game that was played on the field. For Marshall, football was about the history and the camaraderie between teammates and their fans. It held a deeper meaning.

On July 6, 1933, a newspaper headline in Boston read, “Football Braves Become Redskins.”⁴² The Washington football team—then called “The Braves”—moved to Fenway Park in Boston, Massachusetts and changed its name to “The Redskins.”⁴³ While the choice of name and cause for change still remains unclear, the Boston Globe then reported the change to “Redskins” was in response to “keeping with a plan . . . to ‘sign up a number of Indian players’ and befitting a team that played its games in ‘The Wigwam.’”⁴⁴

Although the true origin of the word, “Redskin” is in dispute, “early historical records indicate that ‘Redskin’ was used as a self-identifier by Native Americans to differentiate between themselves and the Americans.”⁴⁵ It was also used when Native Americans negotiated with the French and, later, Americans.⁴⁶

Even if the general public were provided with adequate reasoning for the name choice, this name, and subsequent trademark, has come under intense scrutiny, as many Native Americans consider this name and representation to be derogatory to their heritage.⁴⁷ However, the Washington Redskins’ team owner, Daniel Snyder, does not view the team

39. *Id.* at 3, 5.

40. *Id.* at 6, 9.

41. *Id.* at 47.

42. Kevin Paul Dupont, *Redskins Name Debate Traces to Boston*, BOSTON GLOBE (Dec. 29, 2013), <https://www.bostonglobe.com/sports/2013/12/29/redskins-wonder-what-name-the-answer-traces-back-boston/GmfYbPTnHx1Ht5NgqN1EOM/story.html>.

43. *History by the Decades*, REDSKINS.COM, <http://www.redskins.com/team/history/history-by-decades.html>.

44. Dupont, *supra* note 42.

45. Lakshmi Gandhi, *Are You Ready for Some Controversy? The History of ‘Redskin,’* NPR (Sept. 9, 2013, 10:46 AM), <http://www.npr.org/sections/codeswitch/2013/09/09/220654611/are-you-ready-for-some-controversy-the-history-of-redskin>.

46. *Id.*

47. Hopkins & Joraanstad, *supra* note 6, at 271.

name in the same light as many of the general public does currently.⁴⁸ As presented by Julie A. Hopkins and Thomas M. Joraanstad,⁴⁹ although Native American groups and many non-Native Americans believe that the name should be removed due to its representation of an oppressed culture in American history, Snyder does not believe that the term “redskin(s)” is offensive and refuses to change the name.⁵⁰ This refusal has not stopped protestors from voicing their disdain for the name.⁵¹ Protestors chant “‘Rethink,’ ‘Replace,’ and ‘Rename,’” and Native American protestors proclaim, “‘We are people, not your mascots.’”⁵² However, this ongoing debate is not completely one-sided. Fans of the name make their beliefs known to the public in chanting, “keep the name” during similar situations and protests.⁵³ The public is very divided on this issue and this same divide is reflected in the courts, as well.

II. The “Training” and Past Courtroom Rivalries

A. The *Harjo* Litigation

In 1992, seven Native Americans filed a cancellation petition with the TTAB in “arguing that six trademarks containing the term ‘redskin(s)’ and owned by Pro-Football, Inc. violated the Lanham Act’s prohibition of marks that disparaged persons or brought them into contempt or disrepute.”⁵⁴ This cancellation petition “represented the first opportunity

48. *Id.*; see also Erik Brady, *Daniel Snyder Says Redskins Will Never Change Name*, USA TODAY (May 9, 2013, 4:36 PM), <http://www.usatoday.com/story/sports/nfl/redskins/2013/05/09/washington-redskins-daniel-snyder/2148127>.

49. Julie A. Hopkins holds a B.A. from Smith College and a J.D. from the University of Maryland Carey School of Law. She is a Partner and Chair of the Intellectual Property Practice Group at Tydings & Rosenberg, LLP where she practices all areas of intellectual property law including patents, trademarks, and copyrights. Thomas M. Joraanstad holds a B.A. from Occidental College and a J.D. from William & Mary Law School. He is an associate, practicing corporate and intellectual property law, at Tydings & Rosenberg, LLP.

50. Hopkins & Joraanstad, *supra* note 6, at 271; see also Brady, *supra* note 48 (“‘We’ll never change the name,’ [Daniel Snyder] said. ‘It’s that simple. NEVER—you can use caps.’”).

51. Hopkins & Joraanstad, *supra* note 6, at 268 (citing John Woodrow Cox, *At FedEx Field, Redskins Name Protestors Exchange Sharp Words with Fans*, WASH. POST (Dec. 28, 2014), https://www.washingtonpost.com/local/at-fedex-field-redskins-name-protesters-exchange-sharp-words-with-fans/2014/12/28/f3aa1acc-8ed3-11e4-a412-4b735edc7175_story.html?utmterm=.3c61eb5aac76).

52. *Id.*

53. Chris Lingeback, *‘Keep the Name’ Chant Drowns Out Dan Snyder at Redskins Rally in Houston*, CBS DC (Sept. 6, 2014, 11:16 PM), <http://washington.cbslocal.com/2014/09/06/keep-the-name-chant-drowns-out-dan-snyder-at-redskins-rally-in-houston/>.

54. Hopkins & Joraanstad, *supra* note 6, at 279; see *Harjo v. Pro-Football, Inc.*, 50 U.S.P.Q.2d (BNA) 1705 (T.T.A.B. 1999).

for the TTAB to determine whether a mark disparaged a racial or ethnic group.”⁵⁵ In *Harjo*, the petitioners argued that the “term ‘Redskins’ rarely appears in formal writing, such as judicial decisions, scholarly dissertations, government documents, or papers of diplomacy, where such terms as ‘uncivilized’ and ‘savages’ frequently appeared,” indicating its derogatory nature.⁵⁶ The petitioners further alleged that the term “Redskins,” historically, has been reserved for “informal writings as a slur of the most demeaning sort and as an epithet to influence the sensibilities of the general public.”⁵⁷ The petitioners emphasized that the use of the term in informal contexts, instead of formal, indicates that it is inappropriate for public consumption and commercialization (such as a team name).

In response to these assertions, the TTAB clarified that “whether the marks at issue are disparaging is based on the disparaging nature of the marks when the respective registrations were *issued*, and not whether the marks are considered disparaging in *present* society.”⁵⁸ To determine whether or not a trademark is considered disparaging under Section 2(a), the TTAB looks to the “beliefs of the identifiable group” only, instead of society as a whole.⁵⁹ Therefore, only the “opinions of those individuals [actually] *in* the identifiable group” would be the “only relevant points of view as to whether the term was disparaging.”⁶⁰ To determine this, the TTAB developed a two-part test, which became the standard and reference in evaluating whether or not a trademark’s registration should be barred for being disparaging.⁶¹

After taking the two-part test into consideration, the TTAB determined that the petitioners established, by a preponderance of the evidence, that the term “Redskins”—“as used in Pro-Football’s marks in connection with its goods and services”—disparaged Native Americans.⁶² The identifiable group was composed of a “substantial composite” of Native Americans.⁶³ Thus, the petitioners’ arguments in that case are very similar to the argument being raised and questioned today: Is the use of the

55. *Id.*

56. *Harjo*, 50 U.S.P.Q.2d at 1705.

57. *Id.*

58. Hopkins & Joraanstad, *supra* note 6, at 279 (emphasis added).

59. *Id.* at 279–80 (“[T]he TTAB stated that ‘scandalous’ and ‘disparage’ as used in Section 2(a) represented different statutory bars, holding that ‘scandalous’ looked to society as a whole, while ‘disparage’ looked only to the beliefs of the identifiable group.”).

60. *Id.* at 280 (emphasis added).

61. See *infra* Part III(A).

62. Hopkins & Joraanstad, *supra* note 6, at 280.

63. *Id.*; *Harjo v. Pro-Football, Inc.*, 50 U.S.P.Q.2d at 1747.

term “Redskins” in an official team name comparable to using a racial slur in an official team name?⁶⁴

In response, Pro-Football brought a civil action suit appealing the TTAB’s decision in *Harjo*.⁶⁵ Through a subsequent series of appeals, a federal district court overturned the TTAB’s decision.⁶⁶ However, this decision was in part based upon a finding that “the doctrine of laches barred the plaintiffs from bringing their claim.”⁶⁷ Further appeals were made, but the Supreme Court denied granting certiorari,⁶⁸ which now allows the Redskins to maintain their trademark protection for the time being.⁶⁹

B. The *Blackhorse* Litigation

Concurrent with the *Harjo* litigation, “five Native Americans [also] filed a cancellation petition . . . [again] seeking cancellation of the *same* six trademarks” that contained the term “Redskins” on the grounds that the trademarks “were disparaging to Native Americans and thus barred from registration.”⁷⁰ The *Blackhorse* litigation ultimately concluded in the TTAB’s cancellation of all six trademarks on the grounds that the term “Redskins”—as used in connection with the goods and services offered by the mark—disparaged the Native Americans and their culture.⁷¹

In this decision, “the TTAB reiterated that a ‘substantial composite’ of the referenced group must find the mark as used disparaging.”⁷² The only question in this case, however, was whether the term “Redskins” was disparaging *at the time* of the respective registrations.⁷³ To answer this, the TTAB grouped the petitioners’ evidence into two categories: “(1) general analysis of the term [‘R]edskin(s)[’]; and (2) specific views of the

64. See Alicia Jessup, *Inside the Legal Fight to Change the Washington Redskins’ Name*, FORBES (Oct. 15, 2013, 8:34 PM), <http://www.forbes.com/sites/aliciajessup/2013/10/15/a-look-at-the-legal-fight-to-change-the-washington-redskins-name/#4e570551405a>.

65. Pro-Football, Inc. v. Harjo, 284 F. Supp. 2d 96, 100 (D.D.C. 2003).

66. Pro-Football, Inc. v. Harjo, 415 F.3d 44 (D.C. Cir. 2005), *on remand*, 567 F. Supp. 2d 46 (D.D.C. 2008), *aff’d on laches ground*, 565 F.3d 880 (D.C. Cir. 2009); Pro-Football, Inc. v. Harjo, 565 F.3d 880, 881 (D.C. Cir. 2009).

67. Jessup, *supra* note 64.

68. Harjo v. Pro-Football, Inc., 565 U.S. 880, *cert. denied*, 558 U.S. 1025 (2009).

69. Jessup, *supra* note 64.

70. Hopkins & Joraanstad, *supra* note 6, at 283 (emphasis added); Blackhorse v. Pro-Football, Inc., 111 U.S.P.Q.2d (BNA) 1080 (T.T.A.B. 2014).

71. Hopkins & Joraanstad, *supra* note 6, at 283–84; Blackhorse, 111 U.S.P.Q.2d at *29.

72. Hopkins & Joraanstad, *supra* note 6, at 284; Blackhorse, 111 U.S.P.Q.2d at *10.

73. Blackhorse, 111 U.S.P.Q.2d at *10.

referenced group.”⁷⁴ This evidence focused particularly on “expert testimony, dictionary definitions, and reference books in the first category.”⁷⁵ For the second category, the petitioners’ main piece of evidence was the National Congress of American Indians (“NCAI”) 1993 Resolution.⁷⁶

In 1993, the members of the NCAI passed a resolution against the Redskins team name and titled the resolution, “Resolution in Support of the Petition for Cancellation of the Registered Service Marks of the Washington Redsk*ns [sic] AKA Pro-Football, Inc.”⁷⁷ The TTAB rejected Pro-Football’s argument that this resolution was irrelevant because “it was not passed during the pertinent time period,” reasoning that the “mere fact that an opinion is voiced in 1993 does not mean the opinion was not held by that group or individual in the 1967–1990 time period.”⁷⁸

Focusing on the NCAI’s Resolution, the TTAB found that “*at a minimum* approximately thirty percent of Native Americans found the term [redskin(s)] used in connection with [Pro-Football’s] services to be disparaging’ in the relevant time period, and furthermore, that thirty percent is ‘without a doubt a substantial composite.’”⁷⁹ In a two-to-one vote, the TTAB concluded that the trademarks should be cancelled.⁸⁰ This decision sparked the recent litigation and the question with which society is now posed: Does the cancellation of a trademark’s registration violate the First Amendment to the Constitution of the United States?

III. Legal Questions Surrounding the Change

A. Federal Trademark Law

Federal trademark law is “[o]ne of the most promising methods of action against the use of disparaging sports logos is through federal trademark law.”⁸¹ “Trademark rights are rooted in common law.”⁸² Because a symbol “must actually have been *used* as a trademark before

74. Hopkins & Joraanstad, *supra* note 6, at 285–86.

75. *Id.* at 286.

76. *Id.*

77. *Ending the Legacy of Racism in Sports & the Era of Harmful “Indian” Sports Mascots*, *supra* note 32.

78. Hopkins & Joraanstad, *supra* note 6, at 286; Blackhorse, 111 U.S.P.Q.2d at *18.

79. Blackhorse, 111 U.S.P.Q.2d at *29 (internal citations omitted).

80. *Id.*

81. John R. Wallace, Note, *Discriminatory & Disparaging Team Names, Logos, & Mascots: Workable Challenges & the Misapplication of the Doctrine of Laches*, 12 RUTGERS RACE & L. REV. 203, 216 (2011).

82. Hopkins & Joraanstad, *supra* note 6, at 272.

there is anything to register,” the United States is known as a “‘used-based’ trademark nation.”⁸³ Due to failed attempts at a federal scheme to regulate trademarks, “Congress passed the Lanham Act in 1946, in part, to encourage federal registration and centralization of trademarks.”⁸⁴ The Act governs trademark and unfair competition law.⁸⁵

The Lanham Act and, thus, federal trademark law, allows people to register their marks, which ultimately gives the owners legal protection and remedies when trademark infringement occurs.⁸⁶ The Lanham Act also allows for the cancellation of trademarks. Section 2(a) provides in pertinent part:

No trademark by which the goods of the applicant may be distinguished from the goods of others shall be refused registration on the principal register on account of its nature unless it . . . [c]onsists of or comprises immoral, deceptive, or scandalous matter; or matter which may disparage or falsely suggest a connection with persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute⁸⁷

While a mark registration may be refused under this provision, Section 2(a) of the Lanham Act does not hinder the holder’s opportunity to appeal the decision of the TTAB.⁸⁸ Following a refusal for registration, “the Federal Circuit will review the TTAB’s decision using the record of the underlying TTAB proceeding.”⁸⁹ Therefore, the Federal Circuit does not permit any additional evidence during a TTAB appeal.⁹⁰ If the aggrieved party remains unsatisfied with the decision, it may appeal the Federal Circuit’s decision to the Supreme Court.⁹¹

83. J. THOMAS MCCARTHY, 3 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 19:1.25 (4th ed. 2017).

84. Hopkins & Joraanstad, *supra* note 6, at 272.

85. Alex Butterman, *What the Trademark Ruling on the Washington Redskins Means for Business*, HUFFPOST BUSINESS (Jan. 26, 2016, 3:23 PM), http://www.huffingtonpost.com/quora/what-the-trademark-ruling_b_9081272.html.

86. Volokh, *supra* note 15.

87. 15 U.S.C. § 1052 (2016), *held unconstitutional in* *In re Tam*, 808 F.3d 1321 (Fed. Cir. 2015).

88. Hopkins & Joraanstad, *supra* note 6, at 273.

89. *Id.* at 274.

90. *Id.*

91. *Id.*

This was the case in *Blackhorse v. Pro-Football, Inc.*⁹² In *Blackhorse*, the TTAB found that the petitioners established, by a preponderance of the evidence, that “the term ‘Redskins’ was disparaging of Native Americans, when used in relation to professional football services, at the times the various registrations involved in the cancellation proceeding were issued.”⁹³ A disparaging mark is a mark, which “dishonors by comparison with what is inferior, slights, deprecates, degrades, or affects or injures by unjust comparison.”⁹⁴ To determine if a mark is disparaging under Section 2(a), a trademark examiner considers:

- (1) What is the likely meaning of the matter in question, taking into account not only dictionary definitions, but also the relationship of the matter to the other elements in the mark, the nature of the goods or services, and the manner in which the mark is used in the marketplace in connection with the goods or services; and
- (2) If that meaning is found to refer to identifiable persons, institutions, beliefs or national symbols, whether that meaning may be disparaging to a substantial composite of the referenced group.⁹⁵

Why does the current litigation about the use of the term “Redskins” have merit? The current litigation exists and has merit because the TTAB did not address the question of whether the Redskins name is disparaged *now* in *Blackhorse*.⁹⁶ It was a question of whether the Redskins name was

92. *Blackhorse v. Pro-Football, Inc.*, 111 U.S.P.Q.2d (BNA) 1080 (T.T.A.B. 2014).

93. *Media Fact Sheet: Trademark Trial and Appeal Board (TTAB) Decision in Blackhorse v. Pro Football, Inc. (TTAB Cancellation No. 92046185)*, USPTO (June 18, 2014), http://www.uspto.gov/sites/default/files/news/USPTO_Official_Fact_Sheet_on_TTAB_decision_in_Blackhorse_v_Pro_Football_Inc.pdf.

94. *In re Tam*, 808 F.3d 1321, 1330 (Fed. Cir. 2015) (quoting *In re Geller*, 751 F.3d 1355, 1358 (Fed. Cir. 2014)) (internal citations omitted).

95. *Id.* at 1331 (citing Trademark Manual of Exam. Proc. § 1203.03(b)(i) (Jan. 2015 ed.)).

96. *See Blackhorse v. Pro-Football, Inc.*, 111 U.S.P.Q.2d (BNA) 1080, 35 (T.T.A.B. 2014) (Bergsman, J., dissenting)

To be clear, this case is not about the controversy, currently playing out in the media, over whether the term “redskins,” as the name of Washington’s professional football team, is disparaging to Native Americans today [The narrower legal question is] whether the evidence made of record in this case establishes that the term “redskins” was disparaging to a substantial composite of Native Americans at the time each of the challenged registrations issued.

Id.

“disparaging to a substantial composite of Native Americans” *at the time that the registrations being challenged were issued*.⁹⁷

Although Judge Lee⁹⁸ does not agree with this argument,⁹⁹ the Washington Redskins state that a “vast majority” of Native Americans had *no objection* to the Redskins name when the trademarks were granted between the years 1967 and 1990.¹⁰⁰ Appealing this decision, the Washington Redskins argued that the TTAB’s ruling violated free speech, which is an argument that has given this ongoing debate and case a new life.¹⁰¹

B. The First Amendment Play

1. The First Amendment

Generally, the government cannot prohibit expression of an idea on the ground that the idea itself or the way in which it was expressed is considered to be highly offensive to people.¹⁰² As provided in *Texas v. Johnson*, “[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”¹⁰³ Because of this principle underlying the First Amendment, any time that the government attempts to justify a restriction on expression simply because of its possible derogatory nature, that poses a problem to speech used in society as a whole.¹⁰⁴

In its appeal of the 2014 TTAB decision, Pro-Football, Inc. argued that “Congress shall make no law . . . abridging the freedom of speech.”¹⁰⁵ When looking at the disparagement provision and determining that the TTAB discriminates based on disapproval of the message, the cancellation

97. *Id.*

98. Gerald Bruce Lee is a U.S. District Judge for the U.S. District Court, Eastern District of Virginia in Alexandria, VA and gave the opinion in *Pro-Football, Inc. v. Blackhorse*, 112 F. Supp. 3d 439 (E.D. Va. 2015).

99. See *infra* Part IV.

100. Ian Shapira, *Federal Judge Orders Cancellation of Redskins’ Trademark Registrations*, WASH. POST (July 8, 2015), https://www.washingtonpost.com/local/judge-upholds-cancellation-of-redskins-trademarks-in-a-legal-and-symbolic-setback-for-team/2015/07/08/5a65424e-1e6e-11e5-aeb9-a411a84c9d55_story.html.

101. *Id.*

102. Robert A. Sedler, *Disparaging Trademarks and the First Amendment*, JURIST (Jan. 13, 2016, 8:00 AM), <http://www.jurist.org/forum/2016/01/robert-sedler-first-amendment.php>.

103. *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

104. See Sedler, *supra* note 102.

105. U.S. CONST. amend. I; see Complaint, *Pro-Football, Inc. v. Blackhorse*, 2014 WL 4719977 (E.D. Va. Aug. 14 2014) (No. 1:14CV01043-GBL-IDD).

of the registration of a trademark is not content or viewpoint neutral.¹⁰⁶ “Content-based regulations are presumptively invalid,”¹⁰⁷ as they target speech on its communicative content. As a result, they only “may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.”¹⁰⁸

2. Pro-Football, Inc. v. Blackhorse

Reviewing *Pro-Football, Inc. v. Blackhorse*, de novo, Judge Lee found that the plaintiff, Pro-Football, Inc., did not have a viable claim that Section 2(a) of the Lanham Act violated the First Amendment.¹⁰⁹ Consequently, the TTAB was authorized to cancel the registration of the Redskins’ trademarks because the term may be disparaging to Native Americans.¹¹⁰ In the court’s determination that Section 2(a) does not violate the First Amendment, Judge Lee reasoned that the cancelation of the registration does not actually prohibit the owner from continuing to *use* the mark.¹¹¹

The plaintiff in *Pro-Football, Inc.* first argued that Section 2(a) of the Lanham Act restricts protected speech.¹¹² However, the court held that, because the trademark owner can still *use* the mark, the law does not “prohibit[] or penalize[] any speech.”¹¹³ In its reasoning, the court relied heavily on the recent Supreme Court decision in *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*¹¹⁴ In that case, the Supreme Court invoked the “government speech” doctrine to hold that Texas was entitled to refuse the request of the Sons of Confederate Veterans featuring a

106. *In re Tam*, 808 F.3d 1321, 1334 (Fed. Cir. 2015).

107. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992); *see also* *Ashcroft v. ACLU*, 542 U.S. 656, 660 (2004).

108. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015) (“[A]bove all else, the First Amendment means that the government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”); *see also* *Police Dep’t of Chi. v. Mosley*, 408 U.S. 92, 95 (1972).

109. *Pro-Football, Inc. v. Blackhorse*, 112 F. Supp. 3d 439 (E.D. Va. 2015).

110. *Id.* at 455.

111. *Id.*; *see also* Roberta L. Horton & Michael E. Kientzle, *The Ongoing Dispute Over the Redskins Name*, 11 INTELL. PROP. & TECH. L.J. 15 (2015).

112. Horton, *supra* note 111. I will not be addressing the Due Process and Disparagement claims in detail, in order to focus on the First Amendment for the purposes of this Note.

113. *Pro-Football, Inc. v. Blackhorse*, 112 F. Supp. 3d 439, 455 (E.D. Va. 2015) (“The present case does not concern a statute that prohibits or penalizes any speech as Section 2(a) of the Lanham Act does not restrict one’s ability to engage in a particular form of speech.”).

114. *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239 (2015). *Blackhorse v. Pro-Football, Inc.* and *Walker v. Texas Division, Sons of Confederate Veterans, Inc.* were decided within about a month of each other.

Confederate battle flag on its specialty license plates.¹¹⁵ The court in *Pro-Football, Inc.* relied on the “government speech” doctrine and stated that this form of “speech” was not barred by the Free Speech Clause because, when *government* speaks, it is not barred by this clause from “determining the content of what it says.”¹¹⁶ Thus meaning, the government is exempt from such a bar on speech. With this idea in mind, Judge Lee likened the license plates in *Walker* to the trademark registration for the Washington Redskins and determined that trademark registration is also government speech.¹¹⁷ The court allowed the USPTO to deny registration to the Redskins on the belief that the mark is considered offensive, “just as Texas could deny acceptance of a Confederate license plate on the ground that the Confederate flag is deemed offensive.”¹¹⁸

3. *Analysis and Moving Forward in This Approach*

I agree with the position that there is a flaw in Judge Lee’s analysis.¹¹⁹ The holdings in *Walker* and *Blackhorse* allow private speech to be deemed government speech, thereby creating an immediate bar against any First Amendment issues and setting a dangerous precedent, as this would curtail what can be said in the general public.¹²⁰

The holding in *Walker* is not comparable to the case at hand. Trademark registration, unlike a license plate in *Walker*, is not a representation of a state or a government’s point of view.¹²¹ While one could argue that the registration of the Washington Redskins trademark is acting as a state-endorsement of the team and its choice in name and/or logo, the stronger argument remains that the registration of a trademark does not imply that a particular state or the federal government has endorsed the logo.¹²²

The ultimate determination is up to the individual fans and public, as they—not the government—choose whether to represent the team by donning the logo and chanting the team name. Just as people can choose to

115. *Walker*, 135 S. Ct. at 2253.

116. *Id.* at 2241 (citing *Pleasant Grove City v. Summum*, 555 U.S. 460, 467–468 (2009)) (internal citations omitted).

117. See Rodney A. Smolla, *The Washington Redskins Trademark Decision Violates the First Amendment*, THE MEDIA INSTITUTE (July 27, 2015), <http://mediainstitute.org/IP/2015/072715.php>.

118. *Id.*

119. *Id.*

120. *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2254 (2015) (Alito, J., dissenting).

121. *Id.* at 2249 (“Texas license plates are, essentially, government IDs.”).

122. See *id.*

follow, support, or appreciate certain artists, people can choose to follow, support, or appreciate certain sports teams. To say that the registration of a trademark indicates some degree of government endorsement, would call into question many names—as it does not seem that the government would want to “endorse” already-approved registered trademarks like, “Dangerous Negro shirts,” “Dago Swagg Clothing,”¹²³ “Baked By A Negro bakery goods,” and more.¹²⁴ When presented with these names, it is hard to believe that the government would endorse these trademarks merely because they are registered marks. Conversely, these trademark registration approvals imply that trademark registration is based on private speech, which is protected by the First Amendment and should not be treated as government speech. No one would believe that these marks reflect any type of approval or endorsement by the government. Further, the idea that the government “routinely registers pornographers’ marks,” also implies that none of these approvals can be deemed government speech.¹²⁵

The registration of trademarks—like copyrights and patents—cannot be compared to a government loan, grant, issuance of a license plate, or any other type of government allowance.¹²⁶ In the registration process of a trademark, the government looks to see if the trademark meets statutory criteria (namely, being distinctive), thus entitling the trademark to legal protection from infringement by other private parties.¹²⁷ To ban trademarks simply for “disparaging” content would “unconstitutionally burden[] speech based on content and viewpoint,” which would be comparable to denying the registration of copyrights for “disparaging” books.¹²⁸

123. “Dago” is a highly-derogatory racial slur for Italians. But compare *Change the Mascot Campaign Fact Sheet*, CHANGETHEMASCOT.ORG, <http://www.changethemascot.org/wp-content/uploads/2016/04/ChangeTheMascotFactSheet2016.pdf> (last visited Mar. 23, 2017), where it states the U.S. Government Labels the R-Word as a Racial Slur: On top of dictionaries defining the R- word as a racial slur, the U.S. government officially went on record saying the same thing in 2014. In early 2014, the U.S. Patent Office twice declared that the word is derogatory. If the term Redskins is considered a racial slur and, thus, not suitable for trademark registration, the same line of reasoning should be applied to other racial slurs.

124. Brief for Appellant, Pro-Football at *4, *Inc. v. Blackhorse*, (No. 15-1874), 2015 WL 6692133, at *1.

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

4. *The Argument Against Commercial Speech*

Trademark law and the First Amendment cannot be analyzed in such a simple approach, however. There are complications. “Analyzing the Lanham Act’s anti-disparagement provision under the First Amendment raises particularly difficult questions, both because speech law is so complex and because trademark law is so nuanced.”¹²⁹ As stated in Part III, Section 2(a) of the Lanham Act looks at both the disparaging elements of the speech and the “nature of the goods or services, and the manner in which the mark is used in the marketplace in connection with the goods or services”¹³⁰ Arguably, trademarks *could* fall under commercial speech, because “[trademarks] indicate the source of the good for sale.”¹³¹ In this indication of the source of a good, they “aid consumers in making their purchasing decisions.”¹³²

If the Washington Redskins trademark constituted commercial speech, the speech would be less protected than other constitutionally protected speech.¹³³ The test would be that of intermediate scrutiny, as opposed to strict scrutiny for non-commercial speech. Under *Central Hudson Gas & Electric Corp. v. Public Service Commissioner of New York*, false or misleading commercial speech may be banned.¹³⁴ In *Central Hudson*, the Court established a four-part test where “[the Court] must determine whether the expression is protected by the First Amendment.”¹³⁵ To determine whether commercial speech is protected by the First Amendment, the commercial speech

at least must concern lawful activity and not be misleading. Next [the Court] ask[s] whether the asserted governmental interest is substantial. If both inquiries yield positive answers, [the Court] must determine whether the regulation directly advances the interest asserted, and

129. Zachary S. O'Driscoll, *The Mascot Manifesto: Challenging the Constitutionality of Section 2(a) of the Lanham Act in a Heightened Era of Political Correctness*, 45 CAP. U. L. REV. 161, 163–64 (2017) (quoting Ned Snow, *Free Speech & Disparaging Trademarks*, 57 B.C. L. REV. 1639, 1640 (2016)).

130. *In re Tam*, 808 F.3d 1321, 1331 (Fed. Cir. 2015) (citing Trademark Manual of Exam. Proc. § 1203.03(b)(i) (Jan. 2015 ed.)).

131. Snow, *supra* note 129, at 1645–46.

132. *Id.*

133. *See Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980).

134. *See id.*

135. *Id.* at 566.

whether it is not more extensive than is necessary to serve that interest.¹³⁶

However, this test need not even apply in determining the First Amendment protection of the Washington Redskins trademark. The *Central Hudson* test would not be applied to the actual trademark, but the expressive speech arising from the trademark. The disparagement exclusion would be because of the expressive content of the Washington Redskins trademark and not because the trademark identifies the Washington Redskins. If the trademark registration is cancelled, it is being denied based on its *content* and not for its commercial value. Because this restriction would be content-based, strict scrutiny must apply in assessing its protection under the First Amendment.

While it may be argued that source-identifiers *are* expressive speech,¹³⁷ the *content* of trademark, and thus the disparagement element, is inherently expressive. Team names are not source-identifiers to a particular brand, but expressive of a geographical location, history, or background (e.g., San Francisco 49ers, Green Bay Packers, and New England Patriots).¹³⁸ Because team names are expressive in their content, classifying the Redskins trademark as commercial speech ignores the fact that the cancellation of a trademark inherently requires a subjective analysis on the expressive content of a team's name.

IV. A New Game Plan in *In re Tam*

On December 22, 2015, the Federal Circuit issued a ruling that has provided the Washington Redskins with the persuasive precedent that they had been hoping for in this ongoing legal battle.¹³⁹ In a nine-to-three vote, the Federal Circuit held that the exclusion of "disparaging" marks violated the First Amendment.¹⁴⁰

The facts of this case consider similar elements that exist in the Washington Redskins case currently pending before the Fourth Circuit.

136. *Id.*

137. Snow, *supra* note 129, at 1649 ("Not only does the source-identification function of a mark represent an expressive element of a mark, it represents an expressive element with great value as speech.")

138. Barry Shuck, *NFL: How All 32 Teams Got Their Names*, BLEACHER REPORT (June 13, 2011), <http://bleacherreport.com/articles/733872-how-all-32-nfl-teams-got-their-names> ("Often, team nicknames are derived from people, places or things that are indicative of the area's culture.").

139. See *In re Tam*, 808 F.3d 1321 (Fed. Cir. 2015).

140. Volokh, *supra* note 15; see *In re Tam*, 808 F.3d at 1351; see also *supra* Part III(A) (defining what is a disparaging mark and the test in determining the status of a possibly disparaging mark).

Simon Shiao Tam is the “front man” for an Asian-American “dance-rock” band, “The Slants,” which he named in order to “‘reclaim’ and ‘take ownership’ of Asian stereotypes.”¹⁴¹ Drawing its name inspiration from “childhood slurs and mocking nursery rhymes,” the band’s albums also include names such as “The Yellow Album” and “Slanted Eyes, Slanted Hearts,” which reflect Tam’s general idea of ownership over the Asian stereotypes.¹⁴² “The band ‘feel[s] strongly that Asians should be proud of their cultural heri[ta]ge, and not be offended by stereotypical descriptions.’”¹⁴³ Through their lyrics, performances, and band name, Tam and the band members provide their insights and views on cultural and political discussions about race and society.¹⁴⁴ After being denied registration by the TTAB, Tam argued that the TTAB erred in finding “The Slants” name disparaging and ruling that Section 2(a) of the Lanham Act is unconstitutional.¹⁴⁵ The case was appealed to the Federal Circuit.¹⁴⁶ The Federal Circuit asked the parties to file briefs on the issue whether the bar

141. *In re Tam*, 808 F.3d at 1331. In comparison to the Redskins’ argument, it is important to note that “The Slants” is a group who is reclaiming a term referencing their own identity, and the distinction between a rock band and a NFL team.

142. *Id.*

143. *Id.*

144. *Id.* Although Tam feels that Asians should be “‘proud of their cultural heri[ta]ge, and not be offended by stereotypical descriptions,” Simon Tam has actually been a long-time supporter of the “Change the Name” campaign. *Id.*; Jacqueline Keeler, *The Slants’ Simon Tam: ‘Courts Hijacked My Case,’* INDIAN COUNTRY TODAY MEDIA NETWORK, 1 (Jan. 4, 2016), <http://indiancountrytodaymedianetwork.com/2016/01/04/slants-simon-tam-courts-hijacked-my-case-162956>. After the decision of *In re Tam* was made, Tam agreed to be interviewed to share his perspective to the ruling and his thoughts on the Native American community, as a result. *Id.* In order to be victorious in case, Tam’s legal team argued that the Section 2(a) of the Lanham Act prohibition on the registration of disparaging and/or derogatory trademarks was being “unfairly applied to the very minority communities the law was meant to protect.” *Id.* at 2. He stated that his case was not originally about free speech, but Judge Kimberly Moore “hijacked” the case to become one about free speech. *Id.* Tam believes that it should “be up to community groups to choose their own identities” and that “[the communities] should have a say in particularly these things.” *Id.* at 5.

However, this argument does not make sense, as it is saying that oppressed minorities should have a say in these types of decisions. *See id.* (In that interview, Tam is quoted as saying, “Asian Americans were not allowed . . . [and] weren’t in control over [their] own destiny. [The Asian American community] had this random white judge who made that decision for us and that was the case for many of the cases.”). Tam was upset because he was denied his trademark that was meant to control the Asian stereotype and, thus, control the oppressive nature of the disparaging term. *See id.* To say that only the minority—that the disparaging mark represents—can control how the term is used puts a huge burden on the term. It provides too many limits. Therefore, concerning the Washington Redskins, the term should not be controlled by the people it represents, but be judged on a statutory scale to see if it can be approved for registered. Once registered, whether or not the trademark is used, will be up to the fans.

145. *In re Tam*, 808 F.3d at 1332.

146. *Id.*

on the registration of disparaging marks under the Lanham Act violated the First Amendment.¹⁴⁷

In the majority opinion, Judge Moore¹⁴⁸ stated that Section 2(a) of the Lanham Act denies rights to certain speakers in that the exclusion of disparaging remarks deprives the owners of important legal rights.¹⁴⁹ While Section 2(a) does not, necessarily, ban speech—as people are still free to *use* the unregistered marks—it “does deprive marks of protections that are important to trademark owners and, therefore, tends to discourage people from using disparaging marks.”¹⁵⁰ As presented in *Perry v. Sindermann*, this type of denial of a benefit to a person because of his or her constitutionally protected speech would penalize and inhibit that person’s freedoms and produce results that the government would not support directly.¹⁵¹ Furthermore, a denial of these benefits also creates a “serious disincentive to adopt a mark which the government may deem offensive or disparaging.”¹⁵²

Thus, if an applicant thinks there is the possibility that his or her trademark may be denied registration, canceled immediately, or canceled later down the line—simply because the government does not *agree* with the trademark—a person’s creativity is burdened and hindered in fear of that denial.¹⁵³ Under this approach, the subjective opinion of another will control a person’s interests and ideas. While the argument that a person can use his mark, even without federal trademark registration is plausible, a person will be taking a risk in presenting and using his ideas without any legal protection. Therefore, the fear, alone, (in both being denied registration for a subjective opinion like disparagement and in having one’s idea stolen without the legal protection that is provided by a federal trademark registration) creates an unnecessary burden on the mark’s owner that could be avoided, if Section 2(a) is removed from the Lanham Act.

147. *In re Tam*, 808 F.3d 1321, 1334 (Fed. Cir. 2015).

148. Kimberly Ann Moore is an American federal judge on the U.S. Court of Appeals for the Federal Circuit and provided the opinion in *In re Tam*, 808 F.3d 1321 (Fed. Cir. 2015).

149. Volokh, *supra* note 15.

150. *Id.*

151. *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (“For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to produce a result which it could not command directly.”).

152. *In re Tam*, 808 F.3d at 1341.

153. *In re Tam*, 808 F.3d 1321, 1341 (Fed. Cir. 2015) (“Faced with the possibility of being denied a registration—or worse, cancellation after years of investment-backed brand development—new brand owners are more likely to avoid brand names that may be arguably controversial for fear of later being deemed ‘disparaging.’”).

Judge Moore also reasoned that the disparaging mark exclusion is a viewpoint-based denial of private speakers' speech.¹⁵⁴ "Underscoring its hostility to these messages, the government repeatedly assert[ed] in its briefing before [the Federal Circuit] that it ought to be able to prevent the registration of 'the most vile racial epithets and images.'"¹⁵⁵ However, this presents an issue that is viewpoint discriminatory on its face.¹⁵⁶ "[Section] 2 does more than discriminate on the basis of topic. It also discriminates on the basis of message conveyed, 'the idea or message expressed,' [and] targets 'viewpoints [in] the marketplace.' It does so as a matter of avowed and undeniable purpose."¹⁵⁷

With this idea in mind, compare the terms "Think Islam"¹⁵⁸ and "Stop the Islamisation of America."¹⁵⁹ One is registered for a trademark and one is not.¹⁶⁰ In allowing the registration of "Think Islam" and not "Stop the Islamisation of America," the government is only allowing registration of marks that "refer to particular ethnic groups or religions in positive or neutral ways."¹⁶¹ These are two different viewpoints and although "Stop the Islamisation of America" [sic] conveys an idea that can be deemed hurtful speech and oppresses members of an often-stigmatized community, the First Amendment still protects hurtful speech.¹⁶² Judge Moore also presented these terms as expressive terms, which are entitled to First Amendment protection.¹⁶³

The government cannot refuse to register disparaging marks because it disapproves of the expressive messages conveyed by the marks. It cannot refuse to register marks because it concludes that such marks will be disparaging to others. The government regulation at issue amounts to viewpoint discrimination, and under the strict scrutiny review appropriate for government regulation of message

154. Volokh, *supra* note 15.

155. *In re Tam*, 808 F.3d at 1336 (quoting Appellee's En Banc Br. 1).

156. Volokh, *supra* note 15.

157. *In re Tam*, 808 F.3d at 1335 (quoting *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2227 (2015); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991)).

158. *In re Tam*, 808 F.3d at 1337.

159. *In re Tam*, 808 F.3d 1321, 1328 (Fed. Cir. 2015).

160. *Id.* at 1137, 1328.

161. *Id.* at 1137.

162. *See id.* at 1328.

163. *Id.* at 1328.

or viewpoint, we conclude that the disparagement proscription of [Section] 2(a) is unconstitutional.¹⁶⁴

Denial of rights based on the content of the message is not content or viewpoint neutral and will potentially regulate speech in an unconstitutional manner.¹⁶⁵ While Washington Redskins may be disparaging to a heritage, it is not the government's place to regulate and/or restrict expression of viewpoints.¹⁶⁶ The government cannot deem what gains legal protection through trademark registration.¹⁶⁷ If that takes place, then government endorsement of certain ideas and beliefs is a possibility—and this is something that the government wanted to *avoid*.¹⁶⁸

Judge Moore's strongest reasoning for her holding lies in her belief that trademark registration is not to be considered "government speech."¹⁶⁹ As presented by Judge Moore, "Use of a mark by its owner is clearly private speech."¹⁷⁰ A trademark represents a product, goods, and the source of the product, not the beliefs of the government.¹⁷¹ If the idea that the registration of a trademark represents the government's endorsement of a product, then the government endorses cosmetic companies that test on animals,¹⁷² products that lead to obesity in Americans,¹⁷³ and clothing brands that may violate workplace discrimination in its hiring processes.¹⁷⁴ This Note is not advocating or petitioning for the cancelation in registration of these marks, but instead is requesting a clearer consistent process by which the government approves or disapproves an application for trademark registration. As trademark registration is a regulatory activity, a simple issuance of certificate of registration for trademarks does not

164. *Id.*

165. *See In re Tam*, 808 F.3d 1321, 1328 (Fed. Cir. 2015)

166. *See id.* at 1138.

167. *See id.*

168. *See id.*

169. *Id.* at 1345.

170. *Id.*

171. Volokh, *supra* note 15.

172. *Companies That Still Test on Animals*, THE VEGETARIAN SITE (last updated Feb. 27, 2016), http://www.thevegetariansite.com/ethics_test.htm.

173. Michael F. Jacobson, *McDonald's: Taxing Americans for 56 Years*, THE HUFFINGTON POST (April 15, 2011, 8:09 AM), http://www.huffingtonpost.com/michael-f-jacobson/mcdonalds-anniversary_b_849299.html.

174. Dave Jamieson, *Supreme Court Rules Against Abercrombie & Fitch In Discrimination Case*, THE HUFFINGTON POST (June 1, 2015, 10:44 AM), http://www.huffingtonpost.com/2015/06/01/supreme-court-abercrombie_n_7464534.html.

constitute government speech, thereby allowing for a bar on free speech protections.¹⁷⁵

As the government, itself, explains, “the USPTO does not endorse any particular product, service, mark, or registrant” when one registers a mark.¹⁷⁶ In presenting this language, the government removes itself from the endorsement of any trademark that may be registered. Therefore, the argument of “government speech” is lost and the Washington Redskins mark should be considered private speech, not subject to approval or disapproval by the government through the form of a trademark registration cancellation. For “decades,” the government has maintained the idea that just as the issuance of a trademark registration “does not amount to government endorsement of the quality of the goods to which the mark is applied, the act of registration is not a government . . . pronouncement that the mark is a ‘good’ one in an aesthetic, or any analogous, sense.”¹⁷⁷

This disclaimer provides the notion that the government does not endorse, nor should it endorse any trademark over another. By simply applying a regulatory process in approving an application for trademark registration, the government applies a “one-size-fits-all” objective approach in its process, thus allowing for the greatest amount of consistency in approval or disapproval rates of trademarks. Instead of being fearful that one’s mark may not be approved for registration, simply because it may be deemed to be disparaging by one, a person can rely on an objective process that will allow his mark to reach the community. A small panel’s opinion should not outweigh a crowd’s opinion. The public should be the ultimate judge on whether a particular mark should be accepted or not.

V. The Washington Redskins’ Fumble, Possible Recovery, and Moving Forward

The team in *Pro-Football, Inc. v. Blackhorse* petitioned for certiorari, asking the high court to review a decision of a federal district court in Virginia that upheld the USPTO’s cancellation of its Redskins trademarks

175. See Volokh, *supra* note 15; see also *In re Tam*, 808 F.3d 1321, 1347 (Fed. Cir. 2015) (“[A] registered mark’s placement on the Principal Register or publication in the PTO’s Official Gazette does not morph the private expression being registered into government expression.”).

176. *In re Tam*, 808 F.3d at 1347.

177. *Id.* (quoting *In re Old Glory Condom Corp.*, 26 U.S.P.Q.2d 1216, 1219–20 n. 3 (T.T.A.B. 1993)).

as disparaging to Native Americans.¹⁷⁸ While the case is currently—and will remain—on appeal to the Fourth Circuit Court of Appeals, the team hoped to bypass the Fourth Circuit and be heard alongside the *Lee v. Tam*¹⁷⁹ litigation.¹⁸⁰ However, the Redskins have another means for ensuring that their argument is still heard by the Supreme Court: an Amicus Brief. The Redskins filed an amicus brief supporting The Slants in their *Tam* litigation.¹⁸¹

On January 18, 2017, the Oral Argument for *Lee v. Tam* took place and the justices appeared to look favorably upon the Respondent, Simon Shiao Tam.¹⁸² Therefore, if the oral arguments are a good indicator as to how the Supreme Court will ultimately decide, the Washington Redskins may win their future case without even having to go to the Supreme Court. During the oral arguments, trademark law was compared to that of copyright law.¹⁸³ Although Justice Kennedy conceded that disparagement claims would not work with copyright issues, he questioned the Deputy Solicitor General, Malcolm L. Stewart (presenting on behalf of Petitioner), and stated, “[D]isparagement clearly wouldn’t work with copyright, and—but [sic] that’s a powerful, government program.”¹⁸⁴ After this, Mr. Stewart began to waiver in his argument and said, “If Congress attempted to prohibit [The Slants], either from having copyright protection or copyright registration on their music, that would pose a much more substantial First Amendment issue.”¹⁸⁵ After further questioning, Mr. Stewart stated, “It would be unconstitutional to deny copyright protection on that ground,” as The Slants are “expressing views on social and political issues. They have a First Amendment right to do that.”¹⁸⁶ Although copyright is a different area of intellectual property law, the values of maintaining freedom of speech in trademark law remain just as relevant.

178. *Supreme Court Declines to Review “Redskins” Trademark Decision*, COOLEY (Oct. 3, 2016), <https://www.cooley.com/news/insight/2016/2016-10-03-supreme-court-declines-to-review-redskins-trademark-decision>.

179. *Lee v. Tam*, 137 S. Ct. 30 (2016). The case name is now *Lee v. Tam* and will be, hereafter, referred to as such.

180. *Id.*

181. Brief for Pro-Football, Inc. as Amicus Curiae Supporting Respondent, *Lee v. Tam*, 137 S. Ct. 30 (2016), http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs_2016_2017/15-1293_amicus_resp_football_inc.authcheckdam.pdf.

182. See Transcript of Oral Argument, *Lee v. Tam*, 137 S. Ct. 30 (2016), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2016/15-1293_l6gn.pdf.

183. *Id.* at 3–6.

184. *Id.* at 4.

185. *Id.*

186. *Id.* at 5.

While the Washington Redskins could not join on Tam's litigation, the comparison between the two cases will likely decide the Washington Redskins case.

Conclusion

Although the Washington Redskins name may be derogatory, it is not the government's place to determine whether it should receive legal protection under federal trademark laws. At its core, this is a question of the government's regulation of speech. Even if a mark was considered derogatory in the past, a proper argument that the mark is *presently* derogatory is necessary to show that the mark will be considered derogatory in the future.¹⁸⁷ It is simply not strong enough to use past beliefs as an indicator of how a mark is currently perceived or will be perceived in the future. The idea behind trademark regulation is to protect the owner's property rights—not to put boundaries on a choice of words that may or may not be used.¹⁸⁸ If this were the case, then there would be a severe hindrance on the public's artistic and creative nature in society. People would be afraid to create and express content, in fear that it will not be protected, as it may be subjectively deemed disparaging.

In the meantime, the cancellation of the Washington Redskins' trademark will not go into effect until the team has exhausted the appeals process in federal court.¹⁸⁹ Unless overturned by the Supreme Court, the Federal Circuit's decision provides additional freedom for trademark owners to choose names without hindrance to their creativity. Owners are free to choose names that will best meet their advertising and/or marketing plans. Even if the Supreme Court agrees with the cancellation of the Washington Redskins' mark, the team will still be able to use the name "Redskins" and "leverage trademark protections under state law."¹⁹⁰

187. Shapira, *supra* note 25 ("Armed with fresh data, the Redskins cited a Washington Post poll, published in May, showing that nine in 10 Native Americans are not bothered by the team's name. It [] also pointed to a 2004 poll, by the Annenberg Public Policy Center, that found the same results.").

188. See The Times Editorial Board, *Even If the Name 'Redskins' Is Hateful, It Deserves 1st Amendment Protection*, L.A. TIMES (May 4, 2016, 5:00 AM), <http://www.latimes.com/opinion/editorials/la-ed-0504-scotus-redskins-20160504-story.html> ("[U]nder the [First] Amendment[,] government may neither outlaw their use or punish businesses that use such language. The purpose of the trademark system is to protect property rights, not to establish an index of forbidden words.").

189. Shapira, *supra* note 100.

190. *Id.*; see also Kimberly A. Pace, *The Washington Redskins Case and the Doctrine of Disparagement: How Politically Correct Must A Trademark Be?*, 22 PEPP. L. REV. 7, 54 (1994) ("If the federal registration of the 'Redskins' trademark is cancelled because the mark disparages Native Americans, and the common law denies protection to the mark despite its long use in

However, the protection of this mark—without federal trademark protection—will be more difficult, as the team will be burdened in its branding and help “copycats” who want to sell unlicensed merchandise.¹⁹¹ This would essentially allow for people to make a profit off of the idea of another, which federal trademark law is made to prevent and protect against.¹⁹² In the hopes of protecting creativity and not silencing unwanted speech, the holding in *In re Tam* should remain a strong precedent in upcoming decisions regarding this same issue.

commerce, then the trademark owner would not be able to exclude others from adopting the mark.”).

191. *Id.*

192. See Justin G. Blankenship, *The Cancellation of Redskins as a Disparaging Trademark: Is Federal Trademark Law an Appropriate Solution for Words That Offend?*, 72 U. COLO. L. REV. 415, 451 (2001) (“[A]ny mark that is canceled under section 2(a) of the Lanham Act for being scandalous or disparaging is unlikely to find much protection under common law principles either, although this will ultimately be determined by state courts applying their own common law principles.”); Llewellyn Joseph Gibbons, *Semiotics of the Scandalous and the Immoral and the Disparaging: Section 2(A) Trademark Law After Lawrence v. Texas*, 9 MARQ. INTELL. PROP. L. REV. 187, 232 (2005) (“[A]s immoral, scandalous, and/or disparaging marks may not be registered under either state or federal law, nor do they enjoy common law protection, there appears to be no way of establishing a legally recognized property right in these marks.”).

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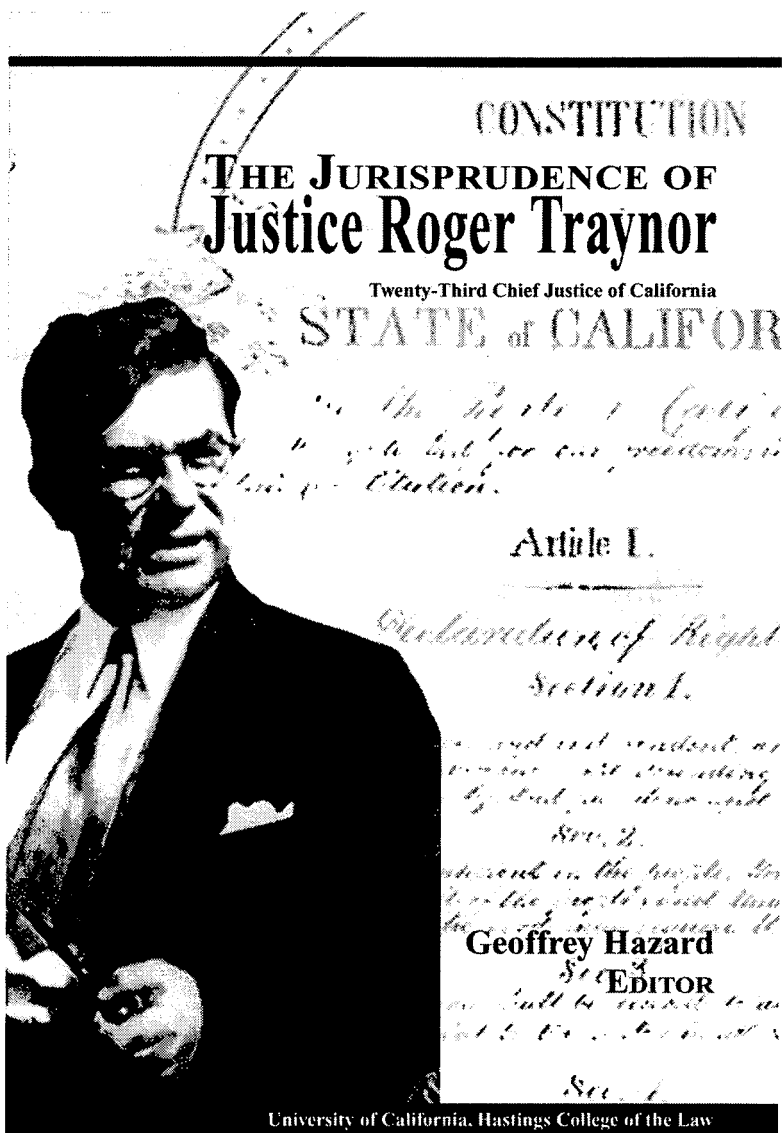
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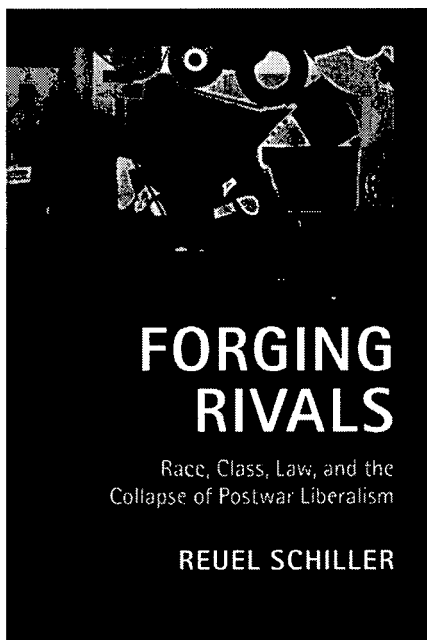
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